

M.D. and others vs. Spain App no 36584/17 (ECtHR 22 september 2022)

Member State

 Spain

Topic

Private life and freedom of expression

Sector

Freedom of Expression and Association; Disciplinary proceedings

Deciding Court Original Language

European Court of Human Rights

Deciding Court English translation

European Court of Human Rights

Registration N

App no 36584/17

Date Decision

28 September 2022

ECLI (if available)

ECLI:CE:ECHR:2022:0628JUD003658417

National Follow Up Of (when relevant)

N/A

ECtHR Jurisprudence

Article 8 of the Convention (private life)

Article 10 of the Convention (freedom of expression)

Baka v. Hungary (Application no. 20261/12)

Subject Matter

Private life – leak of data to the press – disciplinary measures – freedom of expression of judges

Legal issue(s)

The case addresses the inadequate performance of the courts regarding the investigation of a crime affecting the privacy of judges. The lack of diligence prevented the identification of the official who leaked police documents containing personal data to the press. The case also addresses whether the handling of disciplinary proceedings for signing a document with political content constitutes an infringement of the right to freedom of expression.

Request for expedited/PPU procedures

N/O

Interim Relief

N/A

National Law Sources

N/A

Facts of the case

In February 2014, twenty Spanish judges working in Catalonia signed a manifesto expressing their legal opinion on the possibility of holding a self-determination referendum on the political future of the region. The manifesto argued that holding the referendum was compatible with the Constitution and international law.

On 3 March 2013, the newspaper "La Razón" published a report under the title "The conspiracy of the thirty-three separatist judges" which contained photographs and personal details of the judges who signed the manifesto. The information was extracted from police databases. Consequently, the judges filed criminal actions for discovery and disclosure of secrets (Article 147 of the Criminal Code) and disloyalty in the exercise of custody of documents (Articles 415 and 417 of the Criminal

Code). In the first instance (Court number 15 of Madrid) and second instance (Provincial Court of Madrid), given the impossibility of knowing the author of the leak, the courts decided to close the proceedings.

Moreover, at the request of the "Clean Hands" trade union, the General Council of the Judiciary initiated disciplinary proceedings against the judges who signed the manifesto. However, the proceedings ended without sanction and recognizing the judges' freedom of expression.

Reasoning (role of the Charter or other EU, ECHR related legal basis)

In the present case, the ECtHR assessed whether the actions or inaction of the Spanish authorities, the courts and the General Council of the Judiciary respectively, have infringed the judges' rights to privacy and freedom of expression [Art. 8 & 10 of the Convention]. Before addressing the merits of the case, the Court made two observations that deserve to be highlighted regarding the admissibility criteria.

In the Spanish legal system, fundamental rights can be protected by means of criminal or civil proceedings. The Court recalls that insofar as both procedures have the same purpose, the State cannot claim that the appellants have not exhausted the previous avenues by not using both mechanisms. As far as the appellants are concerned, the Court emphasizes the subsidiary nature of the remedy. Thus, if the civil liability of the newspapers was not claimed before the national courts, it cannot be claimed afterwards before the European Court of Human Rights.

In relation to the violation of Article 8 of the Convention, the Court declares that the protection of the right to privacy not only obliges the State to refrain from any action that would infringe it, but also imposes on the State a duty to act and adopt the measures necessary to guarantee the effectiveness of that right. Accordingly, the Court considers that the infringement of the judges' right to privacy has been violated at two different moments. Firstly, the mere fact that the police drafted a report containing photographs and observations of a political nature of the judges who signed the manifesto, without there being any legal provision authorising them to do so and without the judges having committed any offence, constitutes an infringement of their right to privacy.

Secondly, the Court considers it undeniable that the administration alone was able to leak the police report to the national press for subsequent publication. Although the national courts claimed that it was impossible for them to identify those responsible for the leak, the Court alleges that the inability to identify those responsible for the leak was the result of a flawed process in which the duty of investigation was not fully complied with. By way of example, the fact that the chief of the police of Barcelona was not summoned by the Spanish authorities is considered as evidence of the State's lack of diligence. Even though he was the head of the office and the addressee of the report, the courts did not consider it appropriate to summon him to testify. On this basis, the Court considers that the State failed to comply with its positive obligations to ensure the integrity of Article 8 of the Convention.

On the contrary, the Court did not consider that there was a violation of Article 10 of the Convention. Although it is true that the General Council of the Judiciary did initiate disciplinary proceedings against the judges who signed the political manifesto. The Court emphasizes that the proceedings were not initiated ex officio, but at the request of a party, following a complaint from the Clean Hands trade union. And, in any case, the Council decided not to sanction the judges

because it considered that the signing of a document of a political nature fell within the scope of their right to freedom of expression.

Relation of the case to the EU Charter

N/A

Relation between the EU Charter and ECHR

N/A

Use of Judicial Interaction technique(s)

Consistent interpretation

Horizontal Judicial Interaction patterns (Internal – with other national courts, and external – with foreign courts)

The Strasbourg Court in its reasoning cites various precedents of its own, but at no point does it resort to precedents of other jurisdictions. Notably, throughout the text there are no references to the case law of the Court of Justice of the European Union. Therefore, there is no judicial dialogue between international jurisdictions. In relation to the judges' right to freedom of expression, it is worth noting that the court cites among other judgments, the case of *Baka v. Hungary*, no.20261/12, June 23, 2016.

Vertical Judicial Interaction patterns (Internal – with other superior national courts, and external – with European supranational courts)

N/A

Strategic use of judicial interaction technique (purpose aimed by the national court)

N/A

Impact on Legislation / Policy

N/A

Notes on the national implementation of the preliminary ruling by the referring court

N/A

Impact on national case law from the same Member State or other Member States

N/A

Connected national caselaw / templates

N/A

(Link to) full text

[https://hudoc.echr.coe.int/fre#{%22tabview%22:\[%22document%22\],%22itemid%22:\[%22001-218034%22\]}](https://hudoc.echr.coe.int/fre#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-218034%22]})

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